IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 2282 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ISHWARBHAI @ ISABHAI RAMCHANDBHAI KOLI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MS REKHA H KAPADIA for Appellant(s) : 1,
MR ML SHAH, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE MD SHAH

Date : 19/03/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1.This appeal has been filed by the appellant-original accused, who has been charged and tried for the offences punishable under Sections 302, 309 and 354 of Indian Penal Code and Section 135 of B.P.Act in Sessions Case No.21 of 2004 and at the end of trial, he was convicted to suffer RI for life and to pay fine of Rs.500/- for the offence under Section 302 of IPC and to suffer imprisonment for one year for the offence under Section 354 of IPC by the learned Additional Sessions Judge, Fast Track Court No.4, Banaskantha at Deesa, vide judgment and order dated 15-1-2005.

2.The case of the prosecution in short is that on 21-10-2003, victim and her cousin sister-in-law Radhaben went to Lohanor Village for purchasing grocery in the morning and at about 11 a.m. they were coming back to their field where they were residing with their parents and uncle's son. When they were returning through kharaba (gaucher) land, accused who hid himself behind bushes came out and caught hold the victim. When she resisted, the accused dragged her into

the kharaba land which was covered with bushes. Though her cousin sister-in-law Radhaben shouted for rescue, as they were on a gaucher land at 1.38 p.m., nobody came to her rescue. She tried to help the victim but as accused threatened her with axe, she could not do anything. The accused attempted to give blow to the victim but as she resisted, accused gave two blows on the neck of victim as well as on shoulder and spinal cord resulting into her artery being cut leading to profuse bleeding. Therefore, Radhaben ran away to her house situated in their field and informed her brother and father about the incident. Immediately, they including their relatives came to the scene of offence. Thereafter, they also informed Tarad Police telephonically about the incident. In pursuance of that, PSO Tarad Police Station, gave vardhi to PSI and PSI visited the scene of offence and inquired about the same. He recorded the complaint of cousin brother of the victim Prabhubhai Rajubhai Patel and sent the same along with the

report with a special messenger to Tarad Police Station for registering the offfence under Sections 302 and 354 of IPC and Section 135 of B.P.Act and it was registered as Tarad Police Station I.C.R.No.141 of 2003. Meanwhile, PSI also called panchas and prepared inquest panchnama Ex.21 on the spot and thereafter made arrangements to send the body of the victim to Civil Hospital, Tarad, for post mortem. As it was sunset, he deputed some police personnel there for protecting the place of scene of offence and on the next day completed the panchnama of scene of offence and also collected the muddamal including axe thrown away by the accused in the net (jali) found near the scene of offence. He also recorded statements of various witnesses including Radhaben. Meanwhile, he found the accused but as he was injured due to electric shock, arrangements were made to send him for treatment. Thereafter, he was arrested and also seized the clothes worn by him at the time of incident. He also seized blood stained banian

(bandi) and 'adhivato' from the body of the accused and same were sent to FSL along with axe. Blood stained leaves found there were also collected by him. On arrival of post mortem report, cause of death certificate and FSL report, same were kept in the investigation file. At the end of investigation, he submitted the charge sheet into the Court of learned Judicial Magistrate (First Class), Tarad.

3.As the offence alleged against the accused was exclusively triable by Court of Sessions, learned Metropolitan Magistrate (First Class), Tarad, committed the case to the Court of Sessions at Banaskantha for trial wherein it was numbered as Sessions Case No.21 of 2004. Same has been transferred into the Court of learned Addl. Sessions Judge and Fast Track Court No.4, Banaskantha at Deesa. On production of the accused, learned Addl.Sessions Judge framed charge against the accused.

4.As the accused pleaded not guilty to the charge and prayed for trial, to prove the charge against the accused, prosecution examined

P.W.3, Prabhubhai Rajabhai Patel, the complainant at Ex.15; P.W.4, Radhaben Prabhubhai Rajabhai, an eye witness, who accompanied Akhiben to Village Lohanor for purchasing grocery; P.W.5, Naviben Kanabhai Patel, Ex.17, mother of the deceased; P.W.6, Bhemjibhai Karsanbhai Patel, Ex.18, a neighbour of the complainant and Ukardabhai Parbatabhai Patel, Ex.19, another neighbour of complainant. For the purpose of proving the inquest panchnama, prosecution examined P.W.8, Ragnathbhai Kanabhai Patel, Ex.20 and P.W.9, Gangaben Karsanbhai Ex.22. For proving the panchnama of scene of offence, prosecution examined P.W.No.10, Natnabhai Jahabhai Patel, Ex.23 and P.W.11, Ishwarbhai Kalaji Suthar Ex.28. For proving seizure of cloth of the deceased, prosecution examined P.W.12, Jayantibhai Mahadevbhai Nai Ex.29 and P.W.13, Danabhai Raimalbhai Patel at Ex.23. To prove the production of cloth of the deceased, prosecution examined P.W.14, Ramjibhai Devjibhai Patel Ex.34. Prosecution also

examined Nagjibhai Kajabhai Patel as P.W.15 at Ex.39, who is the panch of panchnama of place from where the accused has been shifted to hospital and also Prabhubhai Lakshmanbhai, P.W.16 at Ex.43. Prosecution also examined P.W.17, Saibabhai Jorabhai at Ex.45, P.W.18 Kapurbhai Sonabhai Taral Ex.48, who are the PSOs of Tarad Police Station at the relevant time and through whom prosecution proved vardhi etc. and P.W.22, Jayprakash Rambhai Patel, Ex.60, who is the PSI and Investigating Officer, who recorded the complaint, investigated the matter and submitted the charge sheet into the court. To prove the injury and post mortem note, prosecution examined Dr.Dipakkumar Dharmaji Geloth as P.W.1 at Ex.6, who performed post mortem on the dead body of deceased. Prosecution placed reliance upon various other documentary evidence also. On submission of closing pursis by the prosecution, learned Judge recorded further statement of the accused under Sec.313 of Cr.P.C.

5.Thereafter, after hearing the learned counsel appearing for the respective parties, learned Addl. Sessions Judge delivered the impugned judgment whereby the appellant accused was convicted for life, which is giving rise to the present appeal.

6.We have heard leaned counsel for the appellant, Ms.R.H.Kapadia and learned APP, Ms.M.L.Shah for the respondent-State. They have argued the matter on the basis of record and proceedings called for by this Court and also on the basis of papers available with them.

7.It has been mainly argued by Ms.Kapadia that the appellant is innocent and has been falsely involved into the crime in question as there was a love affair between him and the deceased and they have decided to leave the house together. According to her, there is a delay in filing the FIR. It is further argued that the incident has taken place very near to the agricultural field where certain families are residing. Still, however, prosecution has not collected sufficient material evidence nor

recorded the statements of witnesses from the said place. Though evidence of Radhaben is recorded, it is not trustworthy as she being an interested witness. It is further argued that weapon has been recovered on the next day very near to the scene of offence. After the incident, the accused also received injury while attempting suicide and, therefore, it cannot be said to be a cruel murder but was a case of sudden provocation resulted into offence under Sec.302 and hence, it is requested that case of the appellant may be considered under Sec.304 Part II.

8. Learned APP, Ms.M.L.Shah, has vehemently argued that in this incident a young girl aged about 18 years has been brutally murdered by the appellant accused in presence of her cousin brother's wife i.e. Radhaben as she did not succumb to lust. The blows given by the victim are four in number out of which, two are on neck as a result of that main artery has been cut and there was profuse bleeding and as a result of that, deceased succumbed to the

injuries. The weapon used by the appellant is a deadly weapon i.e. axe and parts selected by the accused are vital parts of the body of the deceased and, therefore, case cannot be treated to be falling under Sec.304 Part II.

9. According to her, evidence of Radhaben is trustworthy and free from doubt and merely she is the relative, she cannot be said to be an interested witness. The incident has taken place in broad day light in kharaba (gauchar) land at 1.30 p.m. and, therefore, the time selected by the accused speaks volume as obviously nobody would be available at that time. Taking us through the oral evidence of Investigating Officer and also the relevant discussion from the judgment, no delay in filing FIR is said to have occurred. As regards recovery of axe on the next day, it is contended that as it was sunset, further investigation could not be done and therefore, the place was protected by deputing some the police personnel and on next day, further investigation was done. Since it is a case

wherein a young lady aged about 18 years, who did not succumb to the desire of the appellant accused, has been brutally murdered by the appellant and, therefore, it cannot be viewed lightly. She has also taken us through the further statement of the appellant and other evidence on record and submitted that it is a case wherein appeal does not merit any consideration at admission stage.

10.We have gone through the oral as well as the documentary evidence shown to us by the learned counsel for the respective parties as well as the judgment impugned. Regarding delay in filing the FIR, evidence of P.I. and other evidence are required to be considered. It has been categorically deposed by PI that recording of FIR has been completed at 5.15 p.m. and thereafter, he started preparing inquest panchnama Ex.21. Since it was sunset, he could not complete the inquest panchnama on the same day and, therefore, place was protected by posting some police personnel at the place of scene of offence. However, complaint has been

registered by Tarad Police Station at 6.45 p.m. and it has been sent by PSI from scene of offence to Tarad Police Station with a special messenger. Hence, keeping in mind all aspects, there cannot be said to be any delay in filing the FIR.

11.It is established that incident in question been taken place in the kharaba (gaucher) land of Tarad Taluka at 1.30 p.m. As per the evidence of Radhaben, who is the wife of cousin brother of victim, both were going to Village for purchasing grocery and when they were coming back, the accused, who hid himself behind bushes, abruptly came out with axe and caught hold the victim and dragged her into the interior part of kharaba land. Though Radhaben tried to rescue, she was threatened by the appellant showing axe and, therefore, she could not do anything except shouting for help. Even deceased also tried to resist but could not escape. The accused gave four axe blows on vital parts of the body of the deceased out of which, two blows have been given on neck

resulting into her artery being cut and blood being oozing out. Of two other blows, one was on shoulder and another on part of spinal cord. She however succumbed to the grievous injuries. Radhaben immediately went to her house and informed her husband and others. All came there and relatives were also called and thereafter informed Tarad Police Station about the incident and in pursuance of that, PSI, Tarad Police Station, came to the scene of offence along with vardhi. He recorded complaint of husband of Radhaben, Prabhubhai Rajabhai Patel, and sent it for registration of offence along with a report with a special messenger and offence was registered at Tharad Police Station. He also recorded statements of eye witness Radhaben and other witnesses.

12.In this case, Radhaben is the prime witness or we can say the only eye witness. She narrated the incident in detail at the earliest first before her husband and others and thereafter before the Police. She has also deposed the same into the Court also in toto. She has been

thoroughly cross examined by the learned counsel for the appellant accused into the court below. However, nothing contrary came out except few suggestions that, she is the relative of the victim but there are no other defense put forward by the learned counsel for the appellant namely, there were love affairs between the victim and the appellant and they had decided to leave the Village and, therefore, he has been falsely involved into the crime in question. However, same has been denied by both the witnesses i.e. Radhaben and complainant, Prabhubhai Rajabhai Patel. Apart from the evidence of Radhaben, another important evidence connecting the accused with the crime in question is the independent evidence of FSL. Panchnama Ex.24 shows that axe thrown by the accused in the 'jali', plain soil and leaves found there were having bloodstains. It is also established that blood group of the deceased was 'A' and the blood stains found on leaves, plain soil and clothes seized at the time of arrest of the accused

i.e. baniyan, bandi and 'adivatu' were of human blood. FSL reports Exs.66 and 67 show that all the above referred articles were found to have the human blood which was of the blood group 'A'. As stated above, blood group of deceased was 'A' and, therefore, presence of the appellant accused has been established even by way of scientific method over and above the testimony of Radhaben.

13.It is required to be noted that appellant, victim, complainant and Radhaben are from same Village and they know each other since childhood. We have evaluated the evidence of Radhaben keeping in mind the fact that she is the nearest relative of the victim. It is to be borne in mind that in Village, woman would not move alone. It has been established that the distance between Village and residence is about 1 and ½ to 2 kms and it will not take more than an hour to travel. Her presence is thus quite natural. Incident has taken place at 1.30 p.m. and before the assault, the appellant tried to catch-hold and drag the victim and Radhaben

tried to shout for help. In view of the above, question of misidentification may not arise at all. Over and above, version of prosecution is corroborated by way of scientific evidence of FSL. As argued by the learned counsel for the appellant, the appellant had also received injury by way of electric shock. However, we have gone through his further statement recorded by the concerned Judge under Sec.313 of Cr.P.C. wherein he has denied the same. Not only that, even the appellant has chosen not to enter into the witness box. Not a single suggestion has been putforward by any witness regarding the same also. Moreover, it has not been established as to when the said electric shock had occurred. If the cross examination of Dr.Dipakkumar Dharmaji Gelot, who examined the appellant, is looked into, it would suggest that the appellant received electric shock later on and for that, he has been admitted in the hospital. On that ground, seriousness of of the offence will not be diluted more particularly when a young lady aged about 18

years has been brutally killed by the appellant since she did not succumb to the desire of the appellant and hence, this type of offence cannot be treated lightly and has to be viewed with extreme seriousness.

14.We have given thoughtful consideration to the submission made by the learned counsel for the appellant for treating the case as the one under Sec.304 Part II of IPC. Evidence on record clearly shows that there was enmity and specific motive on the part of accused. Since the deceased did not succumb to the desire of the appellant accused, the accused went to the scene of offence with axe, hid behind bushes and when the victim reached at the place of incident, he abruptly came out, caught hold the victim, dragged her and brutally murdered the victim. The circumstances appearing on record do not show any provocation having shown by the deceased and hence, it cannot be said to be an incident happened all of a sudden due to sudden provocation. On the contrary, it can be said that it is a planned murder wherein young lady

aged about 18 years has been brutally killed. Hence, the case cannot be treated to be the one falling under Sec.304 Part II.

15.No other arguments have been advanced by the learned counsel for the appellant.

16.In view of the above discussion, we are of the opinion that no illegality has been committed by the court below in the impugned judgment and order of conviction and sentence warranting interference by this Court in the present appeal. Hence, this appeal is required to be dismissed.

17.This appeal is hereby dismissed.

18.Record and proceedings are ordered to be sent back forthwith.

(R.P.DHOLAKIA,J.) (M.D.SHAH,J.)

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